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NO. 98-1908

In the Supreme Court of the United States

October Term 1999

PROFESSIONAL DIVERS OF NEW ORLEANS,
Petitioner,

v.

DOUGLAS WISNER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY HALLIBURTON ENERGY SERVICES, INC. IN SUPPORT OF PETITIONER

June 24, 1999

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

NOW COMES Halliburton Energy Services, Inc., and moves this Honorable Court for leave to file the accompanying *amicus curiae* brief in support of Petitioner, as provided in Rule 37 of the Rules of the Supreme Court of the United States. The consent of the attorneys for the Petitioner has been obtained in writing and a letter of consent has been filed with the Clerk of this Court. The consent of the attorneys for the respondent was requested but said consent was not given.

Halliburton Energy Services, Inc. is an oil and gas

service company engaged in numerous operations on the navigable waters of the United States. As such, the question of seaman status is one of prime importance to the corporation. Halliburton Energy Services, Inc. is licensed to do and does significant business in the State of Louisiana. Accordingly, it is subject to the jurisdiction of the state courts in Louisiana. The decision of the Louisiana Supreme Court in this case has dramatically altered the test for seaman status as it would apply to cases that are filed in state court in Louisiana. Since many of Halliburton 33,000 employees work on the navigable waters of the United States and are subject to coverage under the Longshore and Harbor Workers Compensation Act or the Jones Act, any change in their status has direct impact on the nature and amount of their compensation for injury.

Because the decision in the Louisiana Supreme Court in this case has changed the status of those individuals who were once longshoremen, to Jones Act seamen, any decision in this case would have significant impact on Halliburton.

While Petitioner will concentrate on the particular facts of its own case, Halliburton's brief will deal with the general implications of the need for uniformity in maritime law and the problems that will be confronted with national and international corporations that are subject to jurisdiction in the State of Louisiana which now has its own test for seaman status.

Accordingly, Halliburton Energy Services, Inc. respectfully submits that its Motion to File Amicus Curiae Brief should be granted and that the following and attached *amicus curiae* brief should be accepted by the Court in connection with the captioned case.

Respectfully submitted:

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae[1], Halliburton Energy Services, Inc. ("Halliburton"), respectfully submits this Brief in Support of Petitioner's Application for Writ of Certiorari in Douglas Wisner v. Professional Divers of New Orleans, No. 98-1908.[2]

Halliburton is an oil and gas service company with employees located both in the United States and internationally. Because a substantial amount of Halliburton's work relates to oil and gas exploration offshore and on navigable waters, it is continually confronted with the question of the seaman status of its injured employees. Because Halliburton is subject to the jurisdiction of Louisiana state courts, it has a keen interest in the outcome of this case which established a test for seaman status that would be unique to suits filed in Louisiana state courts. Moreover, because Louisiana has rejected federal forum non conveniens rules for maritime cases, virtually all of Halliburton's maritime business around the world would be affected by this case.

SUMMARY OF ARGUMENT

The Louisiana Supreme Court, ostensibly following United States Supreme Court precedent, has, instead, fashioned its own test for seaman status insofar as it

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[1]Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, counsel verifies that undersigned counsel for amicus authored the brief in whole, and no other person other than amicus curiae, its members, or its counsel have made any monetary contribution to the participation or submission of the brief.

[2]Halliburton has received the written consent of the Petitioner and its letter of consent has been filed with the Clerk of Court. Respondent has not given consent to file this brief.

relates to an employee's connection to a vessel in navigation, or an identifiable group of vessels, that is substantial in both duration and nature. The Louisiana Supreme Court has removed the requirement, established by federal precedent, that an injured worker seeking coverage under the Jones Act have a substantial connection to an identifiable fleet of vessels with a requisite degree of common ownership or control. Instead, the Louisiana Supreme Court has employed a "totality of the circumstances" test granting seaman status to anyone who is "subject to the perils of the sea".

The Louisiana Supreme Court decision has created an irreconcilable conflict with the body of federal jurisprudence and the holdings of this Court, on the subject of seaman status. The holding of the Louisiana Supreme Court in this case violates the principle of uniformity in maritime law.

Because Louisiana state courts will be obligated to follow the holding of Louisiana's highest court, corporations, such as Halliburton, who are subject to jurisdiction in the State of Louisiana ,will be confronted with a different and opposing test for seaman status for litigation proceeding in state court pursuant to the "saving to suitors" clause. Prior to commencement of litigation, employers who are subject to suit in Louisiana will be unable to determine which of the competing state and federal tests for seaman status should be utilized when endeavoring to establish the injured employee's appropriate compensation payments.

The conflict created by the Louisiana Supreme Court in this case goes far beyond the territorial borders of Louisiana. If a corporation is subject to jurisdiction in Louisiana, an injured employee, if a United States citizen, injured virtually anywhere in the world, could still bring suit in Louisiana and avail himself of the different and less restrictive test for seaman status available to him in Louisiana. Status will no longer be determined by a single clear test applicable to all employers and employees.

Instead, a different test would apply simply based upon the employers' amenability to suit in Louisiana.

Because a state court of last resort has decided an important federal question in a way that directly conflicts with the decisions of this Honorable Court as well as several United States Courts of Appeal, the granting of the writ herein is warranted.

ARGUMENT

Halliburton Energy Services, Inc. (hereinafter referred to as "Halliburton") is a Delaware corporation having its corporate headquarters in Texas and is a subsidy of Halliburton Company. Halliburton is one of the world's leading providers of products, services and integrated solutions for oil and gas exploration and production. The company's capabilities range from the initial evaluation of producing formations to drilling, completion, production and well maintenance; either for a single well or an entire field. Halliburton has a global presence with over three hundred service centers in more than sixty countries. Halliburton employs approximately 33,000 individuals nationwide. In addition, many of its employees, who are United States citizens, also work at Halliburton's international locations. Halliburton also has a strong presence in the Gulf of Mexico, working within the territorial waters of states abutting the Gulf and at various locations on the outer continental shelf and elsewhere. Because of its work in the Gulf of Mexico, Halliburton maintains a registered office in New Orleans, Louisiana. Halliburton is licensed and authorized to do business in the State of Louisiana.

Because of the nature of Halliburton's work on navigable waters, its employees are assigned to a variety of offshore locations which can be either fixed platforms, jack-ups, semi-submersible rigs or other offshore exploration and production facilities or vessels. Halliburton's employees are always transported to these

offshore locations by either vessel or helicopter. The nature of Halliburton's work is such that its employees work a variety of schedules of varying duration on vessels and non-vessels alike, as well as periods of time offshore.

In every instance of an injury to a Halliburton employee, once that injury becomes one of lost time, Halliburton must assess and determine the employee's status so that payments under the appropriate compensation scheme, i.e., maintenance and cure, or longshore and harbor workers benefits, can begin. Thus, the question of an injured employee's status is one of paramount importance to Halliburton and its employees. Depending on how that question is answered, it may mean a difference in payments to the injured employee between $15.00 a day until he reaches maximum cure (per the maintenance obligation owed to a Jones Act seaman) or two-thirds of the employee's average weekly wages (under the employer's obligation under LHWCA).

The question of status of injured employees affects not just Halliburton. A cursory review of the oilfield directories of New Orleans, Louisiana and Lafayette, Louisiana reveals hundreds of companies involved in the process of exploration and production of oil and gas off the coast of Louisiana. Thousands of employees retained by these companies work on both fixed platforms and movable rigs and perform every category of work from catering and food services to sandblasting, painting, well testing and wireline services. If injured, these employees are subject to two totally different and antagonistic tests for seaman status as a result of the Louisiana Supreme Court decision in this case.

I.

THE DECISION OF THE LOUISIANA SUPREME COURT HEREIN IS CONTRARY TO DECISIONS OF THIS HONORABLE COURT AND OTHER UNITED STATES COURTS OF APPEAL AND UNDERMINES THE PRINCIPLE OF UNIFORMITY IN MARITIME LAW

The Louisiana Supreme Court in this case has fashioned a test for seaman status that is directly at odds with the precedent established by this Honorable Court and other federal courts. Specifically, the Louisiana Supreme Court, in interpreting the requirement that a putative seaman must have a connection to a single vessel or an identifiable fleet of vessels in navigation that is substantial in both duration and nature, has removed the requirement that the vessel connection must be to a single vessel or a fleet of vessels with a requisite degree of common ownership or control. Because the lower Louisiana state courts will be obligated to follow the holding of its highest court, the test for seaman status will be wholly dependent on whether suit is filed in Louisiana's state courts or elsewhere.

The Jones Act, 46 U.S.C. § 688, establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seaman. Garrett v. Moore-McCormack Co., 317 U.S.239, 244 (1942). It makes the Federal Employers Liability Act (FELA) available to maritime claimants by incorporating by reference "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees." 46 U.S.C. § 688(a). It adopts "the entire judicially developed doctrine of liability" under FELA. Kernan v. American Dredging Co., 355 U.S.426 (1958). More particularly, the Jones Act adopts the "uniformity requirement" of FELA, requiring state courts to apply uniform federal law. Garrett, supra.

This Honorable Court has demonstrated a continuing concern for the uniformity of maritime law and deviations from uniformity have been criticized. Haight, Hon. Charles A., Jr. Babel Afloat: *Some Reflections on Uniformity in Maritime Law*, 28 Journal of Maritime Law and Commerce, 189 (1997); The Lottawanna, 21 Wall. 558, 88 U.S. 558, 575 (1874); Kossick v. United Fruit Co., 365 U.S.731 (1961); Moragne v. States Marine Lines, Inc., 398 U.S.375 (1970).

The decision by the Louisiana Supreme Court, if allowed to stand, would undermine needed uniformity in maritime and admiralty law. There is no question that the Louisiana Supreme Court, under the pretense of following federal jurisprudential precedent, has fashioned a new and different test for seaman status in regard to attachment to an identifiable fleet of vessels. Halliburton respectfully submits that the decision by the Louisiana Supreme Court would lead to absurd and untenable anomalies in maritime cases.

For instance, river pilots that pilot numerous vessels on the Mississippi River in Louisiana would be considered seamen under this decision, if they file suit in state court. This is despite the fact that they were previously held not to be seamen due to their lack of connection to an identifiable fleet of vessels with a common nexus of ownership. Bach v. Triden Steamship Co., 920 F.2d 322 (5th Cir. 1991), *cert. granted, judgment vacated by* 500 U.S.949, *on remand* 947 F.2d 1290 (5th Cir. 1991) *cert. denied*, 504 U.S.931 (1991). However, their brother pilots on other rivers of the United States, employed in exactly the same circumstances, would not be seamen, simply because they could not sue in Louisiana.

II.

THE "SAVING TO SUITORS" CLAUSE ALLOWS EMPLOYEES TO SUE IN STATE COURT, WITH ITS DIFFERENT STATUS TEST, ANY EMPLOYER SUBJECT TO PERSONAL JURISDICTION

Injured employees who would not be Jones Act seaman under the federal jurisprudential test for connection to a fleet of vessels with a common nexus of ownership (all as more fully outlined in the petitioner's brief), would likely file suit in state court in Louisiana for a Jones Act claim under the "saving to suitors" clause. The "saving to suitors" clause, contained in 28 U.S.C. § 1333, setting forth the jurisdiction of the United States District Courts provides in pertinent part,

> "The district court shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled..."

This provision recognizes the concurrent jurisdiction of state courts over maritime claims. See, Williams v. M/V SONORA, 985 F.2d. 808, 815 N.7 (5th Cir. 1993). Also Linton v. Great Lakes Dredge and Dock Co., 964 F.2d 1480, 1484-85 (5th Cir.), *cert. denied*, 506 U.S.975 (1992).

Once in state court, these maritime employers/defendants will be unable to remove these cases to federal court for a determination of the status question, under existing federal and U.S. Supreme Court jurisprudence, without some other independent basis for federal jurisdiction and removal. Courts have consistently interpreted the "saving clause" to preclude removabilty of maritime actions brought in state court, provided there is

no independent basis for removal, such as diversity jurisdiction. Although this Court has not directly held that removabilty is prohibited, lower courts have relied on strongly worded dicta from Romero v. International Terminal Operating Company, 358 U.S.354 (1959), to bar removal in such Jones Act cases in order to preserve the plaintiff's choice of forum. Two courts of appeal have squarely faced the issue and have held that admiralty and maritime claims are not removable to federal court unless there exists some independent basis, such as diversity of parties for federal jurisdiction. See, Servis v. Hillard Systems, Inc., 54 F. 3rd 203, 206-207 (4th Cir. 1995), *cert. denied*, 516 U.S.1084 (1996); Linton v. Great Lakes Dredge and Dock Co., 964 F.2d 1480, 1488 (5th Cir. 1992), *cert. denied*, 506 U.S.795 (1992); In Re: Dutile, 935 F.2d 61, 62-63 (5th Cir. 1991).

III.
THE DECISION OF THE LOUISIANA SUPREME COURT GOES BEYOND THE TERRITORIAL BOUNDARIES OF LOUISIANA

The conflict created by the Louisiana Supreme Court in this case is not limited to the territorial boundaries of the State of Louisiana in that national and international companies such as Halliburton, who do business in the State of Louisiana, are subject to personal jurisdiction in Louisiana. Furthermore, as noted above, because of the saving to suitors clause, the state courts in Louisiana will have both subject matter jurisdiction and personal jurisdiction over corporations such as Halliburton, for injuries that may occur extra-territorially to the State of Louisiana.

The Jones Act is for the benefit of seamen against their employers. The jurisdictional reach of this statute extends where there is a sufficient nexus between the defendant and the United States so as to justify assertion of jurisdiction. United Continental Tuna Corp. v. U.S., 550

F.2d 569 (9th Cir. 1977). Thus, as to United States citizen-seaman, in United States waters, it applies to United States or foreign employers. It has been amended to exclude alien offshore petroleum workers in foreign waters (except those having no remedies under foreign law). While it does apply to United States citizen-seamen injured outside United States territorial waters or for injury claims against foreign employers, its application will depend on the application of a list of factors. See Lauritzen v. Larsen, 345 U.S. 571 (1953); Hellenic Lines, Ltd v. Rhodito, 398 U.S. 306 (1970).

In other words, an accident and resulting injury could occur to an employee on the navigable waters of the United States or, indeed, the world, that would subject corporations, such as Halliburton, to suit in the United States and the State of Louisiana. That injured employee, for example, could have been assigned, as Mr. Wisner, to twelve different vessels owned by ten different entities. As noted earlier, the nature of the offshore service work is such that most employees will have widely varied assignment schedules and varying connections to a group of vessels without a common nexus of ownership or control. Rarely will an employee be assigned to a particular vessel for any great length of time. Nevertheless, most of these same employees will be subject to the "perils of the sea." However, simply because the employer is amenable to suit in Louisiana, that individual could file suit against it and avail himself of the different test for seaman status now employed in Louisiana. In contrast, other individuals, injured under the exact same circumstances and having similar vessel assignments and duties, but not having an employer amenable to suit in Louisiana, would not be considered seamen.

IV.

FORUM NON CONVENIENS IS NOT AVAILABLE TO JONES ACT DEFENDANTS SUED IN LOUISIANA STATE COURT

Once suit for an accident occurring outside of Louisiana commences in the State of Louisiana, with rare recourse for removal, a defendant/employer would have to rely solely on the Louisiana rules pertaining to forum non conveniens to get the case transferred. Unfortunately, for a maritime defendant in Louisiana, there is no available transfer mechanism.

La. Code of Civ. Proc. art. 123, contains Louisiana's rule with respect to forum non conveniens. It provides:

> Art. 123. Forum non conveniens
>
> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating

> outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> **C.The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C. § 688 or federal maritime law.**[3]

(Emphasis added). Art. 123 was added by Acts 1970, No. 294, § 1. Amended by Acts 1988, No. 818, § 1, eff. July 18, 1988.

By operation of paragraph B and C, the State of Louisiana commands its courts to entertain the forum non conveniens objection in all federal civil cases except for

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[3]At the time this brief was submitted, the Louisiana Legislature amended parts of this article, and deleted subsection C. The actual effect of the amendment is unknown at this time.

conveniens objection in all federal civil cases except for admiralty, a result deemed ironic by Justice Kennedy in his dissent in American Dredging Co. v. Miller, 510 U.S. 443, 462 (1994). The Louisiana Supreme Court has upheld the freedom of Louisiana courts to reject the federal doctrine of forum non conveniens to maritime suits filed in the state courts. Thus, in Markzannes v. Bermuda Star Cruise Line, Inc., 545 So.2d 537 (La. 1989), *cert. denied,* 493 U.S. 1043 (1990), the Louisiana Supreme Court overturned the application of federal forum non conveniens law and, under local procedure, allowed admiralty claims by a Greek seaman injured aboard a Panamanian cruise vessel en route between Bermuda and Boston to proceed in the Louisiana courts.

In Miller v. American Dredging Co., 595 So.2d 615 (La. 1992), *cert. granted, aff'd sub nom* American Dredging Co. v. Miller, 510 U.S. 443 (1994), the Louisiana Supreme Court again declined to dismiss a case under federal forum non conveniens law and applied its own such law (which exempts maritime claims) to a claim by a Pennsylvania seaman, who was injured on the Delaware River aboard a tug that never plied Louisiana waters, where the only connexity between the seaman's employer -- American Dredging Company, a Pennsylvania corporation principally doing business in New Jersey – was the fact it had a registered agent in Louisiana. Upon certiorari review, this Court affirmed that result, holding that federal law does not preempt Louisiana's doctrine of forum non conveniens in admiralty cases filed in state court under the "saving to suitors clause."

"Because Louisiana has no doctrine of forum non conveniens in maritime cases, a maritime action may be maintained as long as venue is proper and jurisdiction is obtained over the defendant, either in personam or by quasi in rem attachment of its property." Lejano v. Bandak, 705 So.2d 158 (La. 1997), *reh'g denied, cert. denied* (citing Russell v. CSX Transportation, 689 So.2d 1354 (La.1997)). Thus, maritime actors throughout the world

are subject to suit in the state courts of Louisiana on claims arising around the world as long as they have sufficient contacts here for jurisdiction to be had.

V.

BECAUSE OF THE DIFFERENT TESTS FOR STATUS, PRIOR TO LITIGATION, EMPLOYERS WILL BE UNABLE TO DETERMINE WHICH COMPENSATION SCHEME TO UTILIZE FOR PAYMENT TO INJURED EMPLOYEES

If litigation commences in a United States District Court or another state court, employers will naturally follow the precedent of this Court in determining compensation owed to maritime employees. If litigation commences in Louisiana state court, notwithstanding federal jurisprudence, which should have primacy in these matters, state district courts will be compelled to follow the ruling and holding of their highest court. Accordingly, the status test formulated by the Louisiana Supreme Court will be applied in state litigation. Meanwhile, parallel or similar litigation in United States District Courts and other state courts will proceed using a totally different standard for status.

The problem is especially acute in the pre-litigation stage, when an employer must choose which case law to apply in making the initial status determination. If the Louisiana state court analysis is used, many injured employees will be considered seaman that would otherwise not be able to claim that status under federal jurisprudence. The problem for an employer in establishing a claim file for commencement of payment of maintenance or workers' compensation benefits is basically unsolvable. There is absolutely nothing that an employer can look to that would assist it in determining whether a

Wisner analysis should be utilized or the federal jurisprudential analysis used. This is precisely why principles of uniformity in maritime law are required. It is respectfully submitted that this may result in many employers not paying any compensation and forcing the claim to litigation for fear of using the wrong test.

CONCLUSION

It is respectfully submitted that this Honorable Court is the only body that can resolve this currently irreconcilable conflict with the highest court in the State of Louisiana which is at odds with the body of federal jurisprudence interpreting seaman status under the Jones Act. It is for these reasons that it is respectfully submitted that this Honorable Court should grant the Writ of Certiorari and either summarily reversing the Louisiana Supreme court herein or by allowing argument so that matter may be fully briefed and argued. This Writ Application falls clearly within the considerations contained in Rule 10(b) of the Rules of the Supreme Court of the United States.

To say the least, Halliburton submits that the longstanding body of federal jurisprudence interpreting seaman status questions as it pertains to assignment to an identifiable fleet of vessels, having a common nexus of ownership or control, is correct. The conflict that has been created will have serious repercussions for hundreds of corporations engaged in maritime trade that are ameniable to suit in Louisiana.

Respectfully submitted:

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